

SERVICE DATE - FEBRUARY 11, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41987<sup>1</sup>

WESTERN FUELS SERVICE CORPORATION  
v.  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY<sup>2</sup>

Decided: February 3, 1997

By a complaint filed December 9, 1996, Western Fuels Service Corporation (WFSC or complainant) requests the Board, under the provisions of 49 U.S.C. 11102, to require The Burlington Northern and Santa Fe Railway Company (BN/SF or defendant) to make certain terminal facilities and trackage available for use by complainant. Specifically, complainant seeks access to certain coal mines situated in the Powder River Basin of Wyoming. The mines are located on the Campbell Subdivision of defendant's Powder River Division. It is complainant's intention to originate coal at the mines and deliver it to defendant or another named rail carrier at West Caballo Junction, WY, for ultimate delivery to utility customers. Defendant filed a answer to the complaint. Under 49 U.S.C. 11102(d), the Board must complete this proceeding within 180 days after the filing of the request for relief. The deadline for a decision thus is June 7, 1997.

On January 13, 1997, complainant filed a petition requesting a 3-month (90-day) extension of the deadline for a decision. Complainant asserts that the issues involved are likely to be "complicated and fact-intensive." It asserts that the issues cannot reasonably be resolved within the 180-day period established by the statute. It thus asks for a waiver of the 180-day decision deadline under 49 CFR 1110.9, and it proposes a 270-day procedural schedule. Defendant, by a pleading filed January 13, 1997, concurs in complainant's proposed procedural schedule. However, on January 15, 1997, defendant filed a motion to dismiss the complaint. Complainant's reply to the motion is due on February 4.

DISCUSSION AND CONCLUSIONS

The parties have styled their request for an extension as a request for a waiver of a rule. The 180-day time limit is a

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<sup>1</sup> This proceeding is related to a notice of exemption filed in Western Fuels Service Corporation--Acquisition and Operation Exemption--Burlington Northern Railroad Company, STB Finance Docket No. 33321 (published and served Jan. 14, 1997). A petition to reject, filed by defendant here, is pending in that proceeding.

<sup>2</sup> On December 31, 1996, The Atchison, Topeka and Santa Fe Railway Company merged into Burlington Northern Railroad Company, and the latter changed its name to that indicated in the title. Although this proceeding was initiated before the merger was consummated, we will refer to the new entity by its new name throughout this proceeding.

statutory requirement that may not be waived. Therefore, we will treat the parties' request as one for an exemption under 49 U.S.C. 10502.

Under 49 U.S.C. 10502, we must exempt a transaction or service from a provision of law when we find that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Granting the sought exemption will allow us to compile a fully developed record and to render a thoroughly reasoned decision. As requests for reopening for receipt of additional evidence and for rehearing will be obviated, it will foster the goal of providing expeditious handling and resolution of the proceeding [49 U.S.C. 10101(15)]. Other aspects of the rail transportation policy would not be adversely affected.

The exemption is also of limited scope, as it involves only two parties in a single proceeding, both of which seek only a 90-day extension of the 180-day deadline. Given our limited scope finding, we need not make a market power finding. We note, however, that WFSC has proposed this action.

In view of the above findings, we will grant the exemption. A motion to dismiss the complainant, filed by defendant, is pending before the Board. Complainant's reply is due February 4. We therefore will defer establishing a procedural schedule to govern the processing of this proceeding. We will establish such a schedule, if necessary, after we rule on defendant's motion in a subsequent decision.

A final matter requires comment. In its complaint, WFSC requests that we either declare that the Board's competitive access rules at 49 CFR 1144.5 are not applicable to this case or that we waive them. Those are the rules enacted to govern this type of proceeding. WFSC has offered no reason to support its request that we refrain from applying them to this proceeding. We will therefore deny WFSC's requests. If this proceeding goes forward, we will decide it under the statutory criteria set forth in 49 U.S.C. 11102 and the regulatory provisions under 49 CFR 1144.5. Although section 1144.5(a) specifically addresses only through-route and reciprocal switching remedies, the same considerations that apply vis-a-vis those remedies would apply to requests for terminal trackage rights. Midtec Paper Corp. v. Chicago & N.W. Transp. Co., 3 I.C.C.2d 171, 178 (1986), aff'd sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487, 1501-02 (D.C. Cir. 1988).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt this proceeding from the requirement of 49 U.S.C. 11102(d) that it be completed within 180 days. The deadline for a decision is extended to September 5, 1997.

2. Notice of the exemption will be published in the Federal Register on February 11, 1997.

3. The request for waiver of the requirements of 49 CFR 1144.5 is denied.

4. This decision will be effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary